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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 599

GEORGE WILLIAMS,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, George Williams, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on January 15, 1959, and is not reported, but

appears in the printed Appendix filed with and certified by, the Clerk of the United States Court of Appeals as a part of the record, and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment was filed September 29, 1959, and is not yet reported, but is set forth in the Appendix hereto, and in the certified copy of the record.

JURISDICTION.

The order of the United States Courts of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court, for the Northern District of Illinois, Eastern Division, was filed September 29, 1959. On November 18, 1959, it was ordered that the petition for rehearing be denied. (These orders appear in the Appendix hereto.) This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. Where it appears from the record of the trial that the Court made comments before the jury, on the testimony of witnesses and the demonstrative evidence, which tended to judge the credibility of witnesses and to weigh the evidence; did not the Court commit plain error affecting a substantial right of the defendant, the defendant's right to have these questions decided by a Jury.

2. Was not the defendant's right to a trial by Jury as guaranteed to him by Article III, Section 2 of the

Constitution of the United States and the Sixth Amendment to the Constitution of the United States violated where the Court states before the jury that it is not a reasonable inference that a Government Witness lied before the Grand Jury; where the Government Witness admitted under oath during the trial that he had testified to facts before the Grand Jury that were not true.

3. Was the corroboration of the testimony of an impeached witness that the defendant was the person he met on the dates named in the indictment; sufficient to sustain a conviction, where there was *no* corroboration of the testimony of the impeached witness that he received contraband narcotics from the defendant or at the direction of the defendant.

4. Would it not make a difference as to the sufficiency of the evidence in support of Counts 2, 4, and 5 of the indictment, if the contents of Exhibits 2A, 4A and 6A were synthesized and was not it plain error for the Court to comment before the jury: "It wouldn't make any difference. It still would be heroin—All right"

5. Where the United States Court of Appeals for the Seventh Circuit admits that the purpose of Rule 52 (b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., allows the Court to correct plain errors made in the Trial Court and then distorts the facts to avoid invoking the Rule should not this Court exercise its jurisdiction on the principle that the Federal Rules of Criminal Procedure demand that *all* factual elements of the Government's case be submitted to the jury.

6. Was not the integrity of the Government's exhibits completely destroyed so as to make them inadmissible as evidence, where,

(a) As to exhibit 2A there was direct contradiction between the Government's own witnesses as to who had possession of the exhibit and under what conditions it was kept for a period in excess of twenty-four hours.

(b) As to exhibit 4A which contained two laboratory identification numbers, one being explained away by saying the stamp machine slipped and no explanation being offered as to where the exhibit was and under what conditions it was kept from September 16, 1958 until it was delivered to the United States Chemist at 12:03 p.m. on September 17, 1958, a period of approximately twenty-four hours.

(c) As to Exhibit 6A which laid around the laboratory of the United States Chemist, to which six (6) persons had access for six days from October 16, 1958 to October 22, 1958; was opened October 22, 1958 and laid around the laboratory open and not sealed from October 22, 1958 to October 23, 1958.

(d) As to all of the exhibits where it was established that morphine can be synthesized and there was no proof as to whether Exhibits 2A, 4A, and 6A were synthetic or derivatives of the plant opium.

STATEMENT OF THE CASE.

The indictment consisted of five counts (App. 3-6). Count One charged that on or about September 4, 1958 at Chicago, Illinois in the Northern District of Illinois, Eastern Division, George Williams, defendant herein, did unlawfully and wilfully sell to William Mattingly for the sum of One Hundred Forty Dollars ($140.00) a quantity of a certain narcotic drug, to-wit: approximately 293 grains of heroin, not in pursuance of a written order from the said William Mattingly, on a form, issued in blank for that purpose by the Secretary of the Treasury of

the United States or any delegate thereof; in violation of Section 4705 (a) of the Internal Revenue Code of 1954, as amended by the Narcotic Control Act of 1956. Count three is the same as Count One, except that it alleged the sale of 820 grains of heroin on or about September 16, 1958.

Count two charged that on or about September 4, 1958 at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, George Williams, defendant herein, did then and there fraudulently and knowingly receive, conceal and facilitate the transportation and concealment of a quantity of a certain narcotic drug, to-wit: approximately 293 grains of heroin, which had been previously imported into the United States contrary to law, knowing the same to have been so unlawfully imported; in violation of Section 174, Title 21, United States Code, as amended by the Narcotics Control Act of 1956. Count four is the same as Count two except that it charges that on September 16, 1958, the defendant received, concealed and facilitated the transportation and concealment of 820 grains of heroin. Count five is the same as counts two and four except that it charges that on October 16, 1958 the defendant, received, concealed and facilitated the transportation and concealment of 618 grains of heroin.

No motion was made to quash the indictment. However, originally the indictment consisted of six counts. Prior to trial the Government of its own motion, moved to dismiss Count five of the indictment and Government's motion was granted and Count five of the indictment was dismissed. Count six was renumbered Count five.

The original Count five, dismissed on the Government's Motion, charged that on or about October 16, 1959, at Chicago, Illinois in the Northern District of Illinois,

Eastern Division, George Williams, defendant herein, did unlawfully and willfully sell to William Mattingly for the sum of Three Hundred Dollars ($300.00), a quantity of a certain narcotic drug, to-wit, approximately 618 grains of heroin, not in pursuance of a written order from the said William Mattingly, on a form issued in blank for the purpose by the Secretary of the Treasury of the United States or any delegate thereof, in violation of Section 4705 (a) of the Internal Revenue Code of 1954 as amended by the Narcotic Control Act of 1956.

The cause was tried before a jury before the Honorable Joseph Sam Perry. The Jury returned a verdict finding the defendant, George Williams, guilty as charged in the indictment (App. 96).

The judgment and sentence of the Court committed the defendant to the custody of the Attorney General for imprisonment for a period of seven years (App. 98).

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and denied the defendant's (George Williams) petition for rehearing.

STATEMENT OF FACTS.

William Mattingly, an agent of the Federal Bureau of Narcotics, the Chicago office, testified that the defendant George Williams was the George he was supposed to meet and did meet on September 4, 1958, September 15, 1958 and October 16, 1958. That on September 4, 1958 and September 15, 1958 he gave George money and at the direction of George received Exhibits 2A and 4A which contained a white powder, a suspected opiate. That although he gave George no money on October 16, 1958

he found at George's direction Exhibit 6A which contained a white powder, a suspected opiate.

On September 4, 1958, Mattingly was introduced to George by a Special employee of the Bureau, an informer who had known George before, the Special employee did not testify.

Agent Payne testified that he was a surveilling agent on that date and that George was the person that Mattingly met. Agent Payne did not testify that Mattingly received anything from George or at George's direction.

On September 15, 1958 at 11:30 p.m. on the Northeast corner of 47th and Drexel Boulevard Mattingly met George who was in the company of another person who is unidentified. He walked with George and the unidentified male east on 47th Street from Drexel to Lake Park Avenue. According to Mattingly's testimony it was a distance of two blocks and turned North and went about fifty feet down Lake Park where another unidentified male walked up and handed Mattingly the narcotics. (App. 14)

Russell E. Olexa, another Agent was parked on the west side of Drexel Boulevard at 47th Street at the time and observed Mattingly meet George and the other unidentified negro male and walk east with them. (App. 50) He got out of his car and proceeded to trail them, walking on the opposite side of 47th Street, sometimes behind them and sometimes passing them. (App. 50) They walked down 47th Street for about fifteen minutes and turned north when they reached Woodlawn Avenue. When Olexa reached Woodlawn Avenue neither Mattingly nor George or the other male was in sight. (App. 50) The distance they walked was a considerable distance, a couple hundred yards at least; more than two blocks.

He searched for them for quite sometime throughout the area but was unable to locate them. (App. 50) Olexa did not see anything pass between Mattingly and Williams (App. 50).

Mattingly had to tell Olexa which one of the persons he saw was George; and that he had received narcotic drugs from George.

As to October 16, 1958, Mattingly testified that he dialed Wagner 4-2476. He then dialed Butterfield 8-1777 and asked to talk to George. George answered the phone and they discussed the sale of two pieces of narcotics. George told him to meet him at 11:30 p.m. at 60th & Wentworth. (App. 18-19) A few minutes after 11:30 p.m. George came up to the corner of 60th and Wentworth and Mattingly got out of his car and walked over across the street to him. George told Mattingly he thought that police were in the area; he appeared to be nervous; told Mattingly to drive to 59th and Wentworth and walked off. At 59th and Wentworth a man Mattingly had never seen before, came up; said he was from George and directed Mattingly to drive to 57th and Wentworth. At 57th and Wentworth, Mattingly saw George standing on the corner. George got in the car. Mattingly pulled around the corner and parked on 57th Street. George got out of the car first; Mattingly got out; George asked for the money and said that King would show them where the stuff was. Mattingly gave a signal to the other agents and they placed George and King under arrest. (App. 20) Mattingly asked George where did he put the stuff, George said I will show you. George first directed them away from 57th Street where they were, to an alley between LaSalle and Wentworth on 57th Place. Looking out the window of the car he said this isn't the place and directed them back to 57th

Street. In an alley between LaSalle and Wentworth at 57th Street George and Mattingly got out of the car and George pointed to a package lying at the base of a small pole and said that's it. (App. 22) George said 'King' did not know anything about this deal he was just a fellow George met in a bar and promised a couple of dollars if he would do as George said (App. 23).

There were three other Government Agents in the vicinity of 60th and Wentworth on this day. Agents Eckhardt and Lorenz who were cruising the neighborhood in a 1955 Buick and a colored Agent, Agent Leak who was by himself in an automobile. From 7:00 p.m. until about 10:30 p.m. Agent Eckhardt and Lorenz were keeping a building under surveillance in the vicinity of 65th and Ellis. (App. 54) They did not see George in this vicinity. (App. 59) After a conversation by radio with Mattingly they proceeded to the vicinity of 60th and Wentworth where they arrived shortly before 11 p.m. Before Agent Mattingly arrived they saw George walking up and down the street on different occasions and go into a tavern. They did not see him leave the tavern. (App. 59). But about fifteen minutes after Mattingly arrived they saw George standing on the corner and saw Mattingly leave his car, cross the street and talk to George. George walked away and Mattingly got in his car and drove to 59th Street and parked. A few minutes later another man came up to Mattingly's car and got in. Agents Eckhardt and Lorenz then drove around the vicinity and observed George walking north on Wentworth approaching 57th Street. They returned and parked about two blocks south of Mattingly's car which was still at 59th Street. After a bit Mattingly drove north they followed and saw him turn left at 57th Street. On 57th Street Agent Mattingly signalled them and they

stopped and helped him place George and King under arrest. (App. 54) Agents Eckhardt, Lorenz and Leak had never seen George prior to October 15, 1958.

George Williams testified that he did not know William Mattingly prior to seeing him on October 15, 1958. That he had never talked to him on the telephone or in person and had never discussed or sold to him any narcotics. That he lives at 700 West 61st Street and that his telephone number is and at all times, and dates mentioned here was Triangle 3-1450. (App. 83) That on October 15, 1958 as he left a tavern at 60th and Wentworth, Mattingly whom he had never seen before called his name George and got out of his car, crossed the street and asked him why he was so long coming. George told him he didn't know him and for him to get back in his car. Mattingly insisted and asked him wasn't he going to take care of the business and George again told him he didn't know what he was talking about, told him to get back in his car and George walked away proceeding on to 59th Street. (App. 83) Before he got to 59th Street George met Leander King, a casual friend whom he bumped into occasionally and was talking to him about this incident as they proceeded to 59th Street. They reached 59th Mattingly drove up, got out of his car with his gun drawn and said they were under arrest. Mattingly flagged down a car and two other agents, guns drawn, got out, placed George and King in the car and drove to 57th Street (App. 84). Mattingly picked up a package in the alley and said he had the stuff. Both he and King denied knowing anything about any narcotics. He did not direct the agents to the place where they picked up the package. (App. 86, 88) He knows a girl named Artis Hodge, she lives at 6456 S. Ellis Avenue. She used to be his girl friend more than two years ago. He had seen her occasionally but did not take her out at any time in 1958.

Her telephone number was in his pocket book when he was arrested. It could have been Wagner 4-2476. He never received any phone calls at her house. Her phone number was changed, he thinks she has a Butterfield number now. She was in the courtroom the first day of the trial. (App. 87)

THE DEMONSTRATIVE EVIDENCE.

On September 4, 1958, William Mattingly picked up a cigaret package lying underneath the front bumper of an automobile parked at the corner of 54th and Ellis, reached inside, pulled out another package, felt that it contained a bulk and slipped it into his pocket. (App. 9). He drove back to the office of the Bureau of Narcotics where he met Agent Payne. He opened the package which contained a white powder, field tested the powder and noticed a positive reaction. Mattingly locked the white powder up in a desk for safe keeping overnight. (App. 10) The following morning Mattingly watched while Agent Payne weighed and sealed the white powder in a manila envelope. They both signed the envelope and together delivered it to the United States Chemist. (App. 10) Exhibit 1A is a lock-seal manila envelope in which Agent Payne placed the bulky substance. These lock-seal envelopes cannot be opened without breaking the seal or cutting. Exhibit 1B is a lock-seal envelope Mattingly received from the Chemist the morning of the trial, it was attached to 1A and in a sealed condition. In open Court the Government's attorney opened Exhibit 1B and removed therefrom a Tareyton Cigaret package, Exhibit 2B, one piece of tinfoil, Exhibit 2C and a glassine envelope containing a white powder, Exhibit 2A. Exhibit 2A is a glassine envelope into which Agent Payne placed the white powder he removed from the tin foil.

Exhibit 2C was enclosed in the cigaret package 2B. (App. 11-12).

Agent Payne testified that when he met Mattingly after returning to the offices of the Bureau of Narcotics, Mattingly produced a Tareyton cigaret package, Exhibit 2B, containing a white powder which was field tested and showed to be a suspected opiate. It was retained in a locked steel cabinet in the offices of the Bureau of Narcotics until the following day, by Agent Payne. Agent Payne said he locked it in the steel cabinet and he kept the key to the cabinet. (App. 49)

John D. Endriz, United States Chemist, testified he received Exhibit 1A in a locked-sealed condition about noon on September 5, 1958, from Agent Mattingly. He opened it and removed from it Government's Exhibit 2A, the glassine envelope containing a white powder. He removed the powder, analyzed it and found it to be heroin, a derivative of opium, a narcotic drug. (App. 71)

On September 15, 1958, William Mattingly gave George $400 and was handed a package by an unidentified male who walked up just after he had given George the money. (App. 14) An hour and a half later he met Agent Olexa at 49th and Drexel and they proceeded to the offices of the Bureau of Narcotics where he made a field test and noted a positive reaction. (App. 14) He placed the package in a desk and locked it up for the night. The following morning, September 16, 1958 Mattingly took the package out, weighed it, put it into another larger manila envelope. On September 17, 1958 Mattingly together with Agent Olexa took it to the United States Chemist office and delivered it to the United States Chemist. Government's Exhibit 3A is the lock-sealed envelope delivered to the chemist and Exhibit 3B is the lock

sealed envelope he received from the chemist that morning. In open Court the Government's attorney opened Exhibit 3B and removed from it Government's Exhibit 4A, a manila envelope. Exhibit 4A is the package handed Mattingly by the unidentified third party in the early morning hours of September 16, 1958. (App. 16) At the time he received it he felt it, put it in his pocket and did nothing else with it until he returned to the Bureau of Narcotics on September 16, 1958. (App. 17)

Agent Olexa testified that at 1:30 a.m., on September 16 he met Mattingly at 49th and Drexel. Upon being asked what he had been doing for an hour and a half Mattingly showed him a package containing a white powder, Exhibit 4A. Mattingly field tested the substance on the spot at 49th & Drexel. (App. 52) They then returned to the office, where Mattingly secured the evidence. He did not see Mattingly look it up. Later the same day September 16, 1958 Mattingly weighed the evidence in his presence. (App. 52)

Endriz, the chemist, testified that he received Government's Exhibit 3A in a sealed condition from Agent Mattingly on September 17, 1958 at 12:03 p.m. (App. 71). He opened it and removed from it Government's Exhibit 4A. Besides bearing his signature, both Exhibits 3A and 4A bear the identification number 56076. An identification number is assigned to every sample that comes into the laboratory. The laboratory number was not placed on Exhibits 3A and 4A on the same day. The number is made by a stamp. (App. 72) There is another number on Exhibit 4A, number 56092. That number is scratched out. That is where the stamp slipped. That happens very often. (App. 79) I would not know whether the contents of Exhibit 4A had ever been in any other package. I analyzed Government's Exhibit 4A

and found it to contain diacetylmorphine, commonly known as heroin, a narcotic drug. (App. 80)

On October 15, 1958, Agent Mattingly picked up a package from an alley on 57th Street between LaSalle and Wentworth. He placed it in a desk at the office of the Bureau of Narcotics and locked it up over night. The following morning, he weighed the white powder contained in the envelope, sealed the package up, placed it in a manila lock-seal envelope and with Agent Eckhardt took it to the United States Chemist. (App. 22, 23)

Government's Exhibit 5A is the lock-seal envelope in which he placed the white powder in Government's Exhibit 6A. Government's Exhibit 5C is the package which originally contained the white powder. Government's Exhibit 5B is the lock-seal envelope he received from the Chemist this morning. He identified Government's Exhibit 6A by, "my initials on it." (App. 23, 24)

John D. Endriz, the chemist testified that Government's Exhibit 5A was received in the laboratory by Mr. Fonner on October 16, 1958 at 4:14 p.m. He first saw it on October 22, 1958. It was in the narcotics section of the laboratory waiting to be analyzed. It was in a sealed condition. (App. 72, 73) To my knowledge those seals cannot be opened without breaking, tearing or cutting. The contents cannot be withdrawn without evidence of removal. (App. 73) Government's Exhibit 6A was enclosed in Exhibit 5A. I know because it bears my signature and further, it bears the laboratory identification number 56265. I opened Exhibit 5A and extracted Exhibit 6A from it. I may have seen Exhibit 5C, but I can't identify it. I analyzed Exhibit 6A and found it to be diacetylmorphine, commonly known as heroin, a narcotic drug. There is nothing on Exhibit 5A to show

that it was opened by me. (App. 77, 78) I placed Exhibit 6A in Exhibit 5B (App. 75). Exhibit 5B was sealed on October 23. (App. 77)

John D. Endriz further testified that all the envelopes are sealed when placed in the vault in the laboratory after analysis. (App. 77) That six persons, four chemists, their secretary and the girl who handles the glassware have access to the laboratory and the vault. (App. 76) He would not know whether the contents of Exhibits 2A, 4A and 6A had ever been in any other containers. (App. 78, 80) That heroin can be synthesized and it will be the same chemical as if derived from the plant opium. (App. 74, 75)

ANALYSIS OF TRIAL COURT'S CONDUCT OF TRIAL, RULINGS ON OBJECTIONS AND GOVERNMENT'S ATTORNEYS REMARKS.

CREDIBILITY OF WITNESSES.

While the defense was cross-examining William Mattingly concerning his testimony before the Grand Jury as to what occurred on October 16, 1958 the Government's attorney interposed an objection as follows:

> Mr. Johnson: "Your Honor, I object to this line of questioning *because it does not involve the agent and he has no knowledge of these matters.* Anything further *outside of his testimony, outside of his knowledge,*—"

The Court in ruling on this objection stated:

> The Court: "*I agree with you,* it does not, *but it is not harmful.*" (Italics supplied)

Proceeding with the cross-examination the defense asked Mattingly to read the stricken count of the indict-

ment, the original count five. The Government's attorney interrupted and the Court commented:

Mr. Johnson: "Your Honor,—"

The Court: "That is the count that was stricken, counsel.

Let him ask him about it. *There is no harm in it.* The Government moved to dismiss that count and it is stricken, but if you want to raise it and get it into the case you have a right to."

The Defense proceeded with the cross-examination.

By Mr. Clarkston:

Q. "Did you testify before the grand jury as to facts stated in this count 5 of this indictment?

A. If I used the word "sale" it was in error on the testimony before the grand jury on that particular case. I mean that particular occurrence.

Mr. Johnson: Your Honor, I would like to be heard on this. *This does not have anything to do with this agent and does not have anything to do with the matter of the indictment.*

The Court: *I grant you that.*

Mr. Clarkston: I feel that it does, if the Court please.

The Court: *It is not harmful.* Objection overruled. He may answer that.

You may ask him any question you wish to about it. (Italics supplied)

By Mr. Clarkston:

Q. And are these facts true?

A. No, sir, they are not.

Mr. Clarkston: That is all.

The Court: What do your mean now, they are not? The Jury does not know what you are talking about.

The Witness: On that day I testified in error. I said that the sale was consummated for the purchase of narcotics on that date for $300. The purchase was not consummated at the time. I did not give Williams the $300 on that date.

The Court: You did not do what?

The Witness: I did not give him the $300, so it was not a sale.

The Court: The jury wants to know, did you testify that you did or did not testify that you did on that day?

The Witness: Evidently, according to that I did, yes, sir.

By Mr. Clarkston:

Q. And on that day before the grand jury you were under oath, were you not?

A. Yes, sir." (App. 38-41)

The Defense Attorney in his closing argument stated (App. 91-92):

"Also the Court is going to instruct you too that if a witness has been impeached that is that it has been proven that he gave testimony at another place other than the testimony given here, that you have a right to disregard that testimony except so much of it as is corroborated by other facts in evidence here in the courtroom. I want you to remember that, because Bill Mattingly told you himself that he lied before the Grand Jury."

At this point Counsel was interrupted by the Court which stated:

The Court: "Counsel, the agent did not say that he lied before the Grand Jury. Do not mistate his

testimony. He did not say that he lied before the Grand Jury. *You may make reasonable inferences but don't misquote the record.*" (Italics supplied)

The Government's attorney, Mr. Johnson, in his closing argument stated:

"I would like to talk briefly about one other matter. This matter of Agent Mattingly, talking about the indictment.

He was questioned about an indictment. The court advised you that this indictment was returned by the Grand Jury. This indictment is not drawn up by Mr. Mattingly. *He testifies before them. He stated all the way through and he has testified all the way through that there was not a delivery of the money,* that narcotics were not passed right away, but that they were picked up later.

The question is one of sale, a legal word used by attorneys. Was this actually a sale within the criminal law? It is an indictment which he has nothing to do with and knows nothing about. It is in the judgment of the United States Attorney to decide whether or not this was a sale, whether or not we can prove it on these facts as they stand here—those things are not in the hands of Bill Mattingly. He is an investigator. He testified as to what he did. If he called it a sale, ladies and gentlemen, that is a conclusion just as you make conclusions and I make conclusions. *Whether this is a sale under the law is for lawyers to decide, judges and eventually a jury*—a Grand Jury in that case." (Italics supplied) (App. 92-93)

THE DEMONSTRATIVE EVIDENCE

Under questioning by the Government's Attorney, it came out that morphine may be synthesized, *i.e.*, artificially produced; this colloquy followed:

"By Mr. Johnson:

Q. Just to clarify something, Government's Exhibit 4-A, which is the second one that we discussed, you said it was heroin. Is that a derivative of opium also?

A. It is considered a derivative of opium, yes, sir. However, there has been some research work done on it recently, but it is strictly experimental, and they have been able to synthesize morphine.

The Court: By that you mean to say—

The Witness: That it does not necessarily—

The Court: —that a drug can be made from other chemicals that are synthesized and put together, and it will be the same chemical as if it were derived—

The Witness: Correct, from a plant.

The Court: From the plant of the opium?

The Witness: Yes.

The Court: In other words, they can make it now as well as get it from a plant?

The Witness: But it is not commercially feasible.

The Court: But it is not commercially feasible. Your testimony in your opinion, is this derivative from opium or is this synthesized?

The Witness: It is a derivative of opium.

The Court: It wouldn't make any difference. It still would be heroin. All right." (App. 74-75)

This comment by the Court directed the Jury that it made no difference whether the narcotics were produced artificially; and/or directed that Exhibits 2A, 4A and 6A were derivatives of the plant opium.

When on cross examination it was brought out that there were two laboratory identification numbers on Government's Exhibit 4A, the Court interrupted with the following questions and comments.

"Q. And instead of making it 56076 it was made 56092? The stamp slipped?

A. Yes, that happens very often.

The Court: You are not relying on that last number then, the one that slipped.

The Witness: No, that is scratched out. It is very obvious that it was not to be considered.

Mr. Clarkston: I am going to object to the very obvious, if the Court please.

The Witness: And my initials are on there.

The Court: It may be stricken.

Mr. Clarkston: It has been scratched out.

The Court: You may testify as to whether you know it should be or not." (App. 79-80).

This was the same as directing the jury that Exhibit 4A had been sufficiently identified as the package delivered to the laboratory by William Mattingly on September 17, 1958 at 12:03 p.m.

The Government's attorney in his argument to the Jury admitted that there was confusion as to who kept the narcotics now in Exhibit 2A overnight, Agent Mattingly or Agent Payne. (App. 90-91).

At the close of the testimony of John D. Endriz, the United States Chemist, the Government proceeded to offer into evidence certain Exhibits, testified to during the trial. Defendant's counsel suggested that objections and arguments on the admission of Exhibits be made out of the presence of the Jury. The Court ignored his request.

"Mr. Johnson: Your Honor, the Government at this time would like to offer some matters into evidence.

The Court: All right, make your offer.

Mr. Johnson: The Government would like to offer Government's Exhibits 6-A for identification, 4-A perhaps I should get these in sequence, your Honor. —4-A, and 2-A, as Government's Exhibits 6-A, 4-A and 2-A.

These are the packages containing what have been alleged to be narcotic drugs.

The Government would further like to offer in evidence Government's Exhibits 2-B and 5-C. They are what have been testified to as the original package and the Tareyton package, the original package on one occasion.

Mr. Clarkston: Is that all you are offering?

If the Court please, I would like to object to the offer and the acceptance of any of these into evidence.

First as to Government's Exhibit 2-A, I would like to state that there is no proof that this substance—

Maybe we should be heard out of the presence of the jury, if the Court please.

The Court: I have heard the testimony. Make your objection.

Mr. Clarkston: Two separate persons have claimed to have had possession of Government's Exhibit 2-A. One claimed that he locked it in his desk and one claims to have locked it in a steel cabinet, and each one claims to have done various things to Government's Exhibit 2-A, and I think it certainly should not be admitted into evidence.

Government's Exhibit 2-B, there is no identification that it is—well, there is no testimony that it contained anything except what has not been offered in evidence, which is 2-C; therefore, I think that Government Exhibit 2-B is not proper in this case to be admitted in evidence.

Government's Exhibit 6-A laid around in the laboratory in which six different people worked, and six different people have had access to things for seven or eight days. We do not know what happened to it or what condition it is in, and I think it should properly be excluded.

The Court: Let me see Exhibits 2-B and 2-C.

Mr. Johnson: I will offer, your Honor, in view of the objection, Government's Exhibit 2-C for identification also.

The Court: Is there objection to Government's Exhibit 2-C?

Mr. Clarkston: There is also objection to Government's Exhibit 2-C, yes.

The Court: Objections to Government's Exhibits 2-B, 5-C and 2-C sustained.

Objections to Government's Exhibits 6-A, 4-A and 2-A overruled, and each of these is admitted to evidence.

I believe under the interpretation of the statute that those three are the only ones I should admit. They are admitted.

(Said exhibits, so offered and received in evidence, were respectively marked Government's Exhibits 6-A, 4-A and 2-A).

The Court: You have shown your procedure, but all the jury needs to see is the substance which you have introduced testimony concerning. All the rest of the stuff is not harmful, but it is immaterial. Don't clog up the record.

Is that all for the Government?

Mr. Johnson: May I have a moment, your Honor?

The Court: All right.

Mr. Johnson: Your Honor, at this time the Government will rest.

The Court: I will note that the objections go to the weight and the sufficiency of the testimony and not to the admissibility of it. You are free to argue those matters before the jury, but it does not make the exhibits admissible." (App. 80-82).

Hearing the arguiment and the court's comment on the evidence directed to the Jury's verdict as to whether these were the narcotic drugs procured on September 4, 1958, September 15, 1958 and October 16, 1958.

REASONS FOR GRANTING THE WRIT.

The Court should exercise its jurisdiction in this case for the following reasons:

I. The Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

II. The Court of Appeals below has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a lower Court as to call for an exercise of this Court's supervision.

I.

The important question of federal law which should be settled by this Court is: Where the testimony of an impeached witness is only corroborated as to the meeting of the defendant on the dates in question, is that sufficient to sustain a conviction where there is no corrobora-

tion of the impeached witnesses testimony that he received anything from the defendant, where what he claimed to have received was illustrative of the crime.

William Mattingly the Agent, who testified to meeting the defendant on the dates in question and receiving from him the contraband narcotics, Exhibits 2A, 4A, and 6A also testified that he testified under oath before the Grand Jury that on October 16, 1958 he gave the defendant $300, and consummated the sale of narcotics by the defendant on that date, and that those facts were not true. (App. 40, 41)

Mattingly further testified that the narcotics he received on September 4, 1958, Exhibit 2A, he locked up in a desk overnight for safe keeping (App. 10).

Agent Payne, another Government witness, testified that he retained the narcotics, Exhibit 2A; that he locked it in a steel cabinet and kept the key to the cabinet. (App. 49)

As to the events on October 16, 1958 Agent Mattingly gave as his reason for not consummating the sale set up for that date, that he thought that George would run away with the money and that the only Agent in the area, a colored agent who could have tailed the defendant could not have trailed him because he had car trouble. (App. 37) Mattingly later admitted that the colored agent's car stalled after he, Mattingly left the vicinity and that he did not know it had stalled prior to that time. (App. 38)

With Mattingly admitting what he testified to before the Grand Jury, it was not necessary to obtain and introduce the minutes of the Grand Jury. The direct contradiction of Mattingly by his fellow agent, and the

showing of his disregard for the truth in his testimony about the stalled car showed a complete lack of respect for the truth by Mattingly.

Could the word of such a person supply the confidence for a belief by the jury sufficient to sustain a conviction in a criminal prosecution. He was under oath at the time he made his statements to the Grand Jury and was under oath at the time of giving testimony before the trial Court. Agent Payne did not corroborate the testimony of Mattingly that he received Exhibit 2A from the defendant or at the defendant's direction on September 4, 1958. Agent Olexa did not corroborate the testimony of Mattingly that he received Exhibit 4A from the defendant or at the defendant's direction on September 15, 1958. Olexa testified that he did not see anything pass between Mattingly and the defendant (App. 52). That when he turned down Woodlawn Mattingly and Williams were out of sight (App. 52).

The Trial Court did not leave the question of the credibility of the witness Mattingly to the jury. It stated its opinion at the time of overruling the Government's objections by saying: "*It is not harmful.*"

This did not show the impartial conduct prescribed as consistent with that required of criminal procedure in the Federal Courts.

The Court of Appeals said that this is not plain error, or a defect affecting substantial rights of the defendant such as would *sua sponte* activate Rule 52 (b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. In dismissing cases cited by the defendant, *United States* v. *Carmel*, 7 Cir., 1959, 267 F. 2nd 345 and *United States* v. *Scott*, 7 Cir., 1958, 259 F. 2nd 345, the Court said that the facts are divergent, in the *Scott* case the defendant prop-

erly raised the question in the court below and in *Carmel*, the evidence presented a very close case as to the guilt of the defendant. The statement concerning the *Carmel* case indicates that the Court of Appeals did what the trial Court did, weighed the evidence and decided the credibility of the witness. This was within the province of the jury. This the Court cannot do.

Bollenbach v. *United States*, 1946, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350; *United States* v. *Manuszak*, 3 Cir., 234 F.2nd 421; *United States* v. *Golin*, 3 Cir., 1948, 166 F. 2d 123; *Carothers* v. *United States*, 5 Cir., 1947, 161 F.2d 718.

When the trial Court interrupted Defense Counsel's argument to the Jury and stated that it was not a reasonable inference from his testimony that Mattingly lied before the Grand Jury, it decided for the Jury the question of Mattingly's credibility. This was a ruling by the Court and its timing was such that an objection thereto would only have further emphasized its decision. This was done on the Court's own motion without any prompting from the Government's attorney and so was much more impressive to the jury. The fact still remains that Mattingly was the only person to testify before the Grand Jury regarding this indictment. He testified under oath and admitted in Open Court under oath that the facts that he testified to were not true (App. 38, 39, 40, 41). The trial judge cannot weigh the credibility of the witnesses or take from the jury a controverted question of a material fact, no matter how strongly he may be of the opinion that the evidence has established the fact beyond a reasonable doubt.

It is not without precedent for the Court to consider such a serious error even though it may have gone un-

objected to in the Court below. *Steele v. United States* (CCA5), 222 F.2nd 628.

II.

Another reason why this Court ought to exercise its jurisdiction is based on the fact that the decision of the Court of Appeals below has sanctioned a departure from the accepted and usual course of judicial proceedings by a lower Court. The departure involves affirmance of a conviction in which proof of a knowing and wilful violation must be established. It is the petitioner's contention that no such proof was made, but that both the District Court and the Court of Appeals below relied upon an improper interpretation of the facts necessary to establish the identity of an article especially where that article is illustrative of the offense.

Williams pleaded not guilty to the whole indictment. This put in issue every material fact necessary to the proof of the indictment and *each* count therein. Counts 2, 4 and 5 charged that on September 4, 15 and October 16, 1958, the defendant did then and there fraudulently and knowingly receive, conceal and facilitate the transportation and concealment of a quantity of narcotic drugs, which had been previously imported into the United States contrary to law, knowing the same to have been so unlawfully imported; in violation of Section 174, Title 21, United States Code, as amended by the Narcotics Control Act of 1956.

The Government's Witness, United States Chemist, John D. Endriz, testified that narcotic drugs can be synthesized and they would be the same chemical as if it were derived from a plant, the plant opium. There was no evidence as to whether Exhibits 2A, 4A and 6A, contained synthetic drugs or whether their contents were de-

rivatives of the plant opium. It is only a derivative of the plant opium that could be imported and concealed in violation of Section 174, Title 21, United States Code. The comment of the Court that, "*It wouldn't make any difference. It still would be heroin.*" (App. 75) did not supply that evidence or proof. It only added additional error to the record. It directed the Jury that it was not relevant to convict the defendant on any of the counts in the indictment, whether the narcotics were produced artificially and/or directed that Exhibits 2A, 4A and 6A were derivatives of the plant opium.

This was not the only failure of proof in the Government's attempt to establish the facts set out in the indictment. The chain of possession of the exhibits was not established so as to make them admissible. I have already pointed out the contradiction of the two government agents as to who kept and under what conditions Exhibit 2A was kept from September 4 to September 5, 1958, when it was delivered to the United States Chemist (App. 10, 47 and 49).

Exhibit 4A is the evidence offered as the instrument of the crime set out in Count 3 of the Indictment. This is the Count the Court of Appeals seized on to justify the verdict and judgment on the whole indictment. That would seem to indicate that they considered the evidence presented to support that count of the indictment to be the strongest. This is the exhibit that had the two laboratory identification numbers on it. The Court in its opinion on page 4 in holding that the error with the stamp machine was minor does not seem to have considered the nature of these number machines, *i.e.* that the numbers run in rotation and that the numbered wheels are so close together that they would slip in the same direction. This would make it impossible for the numbers to slip from 56076 to 56092.

Exhibit 4A was enclosed in Exhibit 3A (App. 71) the identification mark of the laboratory number 56076 was not placed on them at the same time (App. 79), nor by the same person. The chemist Mr. Endriz further testified he would not know if the contents of Exhibit 4A had been in any other package (App. 80).

This explanation of the handling of this exhibit casts serious doubt that it is the package allegedly received by William Mattingly on September 15, 1958.

These are not the only facts that raise serious questions as to the integrity of Exhibit 4A. William Mattingly, if he received any package from George Williams, received it September 15, 1958. Both he and Agent Olexa testified that Mattingly met George at 11:30 p.m. on September 15, 1958 at 47th and Drexel, Chicago, Illinois (App. 30, 50, 52). They walked about two blocks or a couple hundred yards down 47th Street (App. 31, 51). Mattingly handed Williams the $400.00 and a third person immediately walked up and handed Mattingly a package (App. 17). The following morning, the morning Mattingly weighed the package, Exhibit 4A was September 16, 1958 (App. 17, 52). Agent Olexa testified that the following morning was actually later the same day that they returned from this investigation (App. 52). The Chemist, Endriz, testified that Exhibit 3A within which Exhibit 4A was enclosed was delivered to him in the laboratory on September 17, 1958 at 12:03 p.m. There is no explanation of its whereabouts, by whom it was kept or under what conditions from September 16, 1958 to September 17, 1958, a period of approximately twenty-four hours.

Exhibit 6A was delivered to the laboratory on October 16, 1958. On October 22, the United States Chemist Endriz found it lying around the laboratory and he opened it,

It was sealed by him on October 23, 1958. (App. 77). There is no explanation of where it was, who it was handled by, or whether it was tampered with in this opened condition from October 22, to October 23, 1958.

Logic and reason sustain us that no one could say what the Jury would have found had *not* these errors been made.

For all of the foregoing reasons, the petitioner urges that the Court of Appeals below has sanctioned a departure from the accepted and usual course of judicial proceeding in the Court below.

CONCLUSION.

Wherefore, for the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LUCAS T. CLARKSTON AND
MAURICE SCOTT, JR.,
Attorneys for Petitioner.

APPENDIX.

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM 1959 - SEPTEMBER SESSION 1959

No. 12621
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
GEORGE WILLIAMS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

SEPTEMBER 29, 1959.

Before DUFFY, SCHNACKENBERG and PARKINSON, *Circuit Judges.*

PARKINSON, *Circuit Judge.* Defendant-appellant George Williams was charged originally in a six-count indictment with violations of the narcotic laws. Counts 1, 3 and 5 charged Williams with sales of heroin in violation of Title 26 U.S.C.A. §4705(a) on September 4, 1958, September 16, 1958 and October 16, 1958, respectively, and Counts 2, 4 and 6 with violations of Title 21 U.S.C.A. §174 on the same dates, respectively.

Prior to trial Count 5 was dismissed on motion of the Government. Thereupon Count 6 was renumbered 5. Williams, having pleaded not guilty, was tried to a jury on the indictment in five counts. The jury returned a general verdict of "guilty as charged in the indictment", and the

District Court imposed a sentence of seven years on the general verdict. This appeal followed.

Williams contends that the verdict is "manifestly against the evidence" as there was not sufficient evidence that the defendant was the person with whom Mattingly dealt in the purchase of the narcotics, and Government's Exhibits 2A, 4A and 6A were improperly admitted into evidence; and that the Trial Court committed prejudicial and reversible error in its examination of witnesses, comments on the evidence and expressions of agreement with statements of the Government's attorney, in failing to correct and admonish the Government's attorney for his alleged improper remarks and in its charge to the jury.

It is settled beyond cavil that a general sentence on a conviction under an indictment in several counts will be upheld if the penalty imposed does not exceed that prescribed for any one count, if that count be good and warrants the judgment, and the evidence sustains the conviction thereon. *United States* v. *Cephas*, 7 Cir., 1959, 263 F.2d 518, 519.

The sufficiency of Count 3 is not questioned and the penalty on conviction of a first offender for a violation of Title 26 U.S.C.A. §4705(a), as charged therein, is a maximum of twenty years imprisonment and a $20,000 fine. The penalty is the same for each of the other four counts of the indictment.

Count 3 charged Williams with a $400 sale of heroin to William Mattingly on or about September 16, 1958. The evidence of the Government was that on September 15 or 16, 1958 William Mattingly, a Federal Narcotics Agent then assigned to the Chicago office, called Williams, with whom Mattingly had previously dealt, at the apartment of Williams' girl friend and made arrangements to purchase three ounces of heroin for the sum of $400; that Williams instructed Mattingly to meet him at 11:30 that night at 47th and Drexel in Chicago; that Mattingly drove to the meeting place with Agent Dino, followed in another automobile by Agents Olexa and Wimpy, and arrived there

at approximately 11:30 P. M.; that there Williams, together with another person who remained unidentified, met Mattingly; that Williams told Mattingly to get rid of Agent Dino, which he did; that Williams, the unidentified person and Mattingly then walked to the vicinity of 47th and Lake Park, where Mattingly paid Williams the $400 and received the heroin from another party, previously identified by Williams as "my boy", who walked up to Mattingly and handed it to him in a manila envelope (Government's Exhibit 4A); that Mattingly then went to 49th and Drexel, a predesignated meeting place in case of separation, rejoined Agent Olexa and they went to the Bureau of Narcotics where a field test was made resulting in a positive reaction indicating the purchased substance was an opium derivative; that it was then locked in Mattingly's desk for the night and the following morning Mattingly, in the presence of Agent Olexa, weighed the heroin, sealed Exhibit 4A in another manila envelope and delivered it to Chemist John D. Endriz; that Endriz weighed and analyzed it and found it to be 819 grains of heroin, a derivative of opium; and that the sale of the 819 grains of heroin to William Mattingly for $400 was not made in pursuance of a written order of William Mattingly on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or any delegate thereof. This evidence adequately supports the conviction on Count 3 of the indictment.

Williams claims Mattingly was impeached by reason of his testimony before the Grand Jury concerning the consummation of a sale of heroin to him by Williams on October 16, 1958, as charged in the original Count 5 of the indictment which had been dismissed prior to trial, and, therefore, his testimony identifying Williams as the one from whom he made the $400 heroin purchase was insufficient to convict, in the absence of corroborating testimony. Although there is more than one reason why this claim is without merit the fact that Mattingly's identification was corroborated by the witness Olexa is dispositive thereof and the statement of any other reason would be redundant.

Williams also claims Government's Exhibit 4A should not have been admitted in evidence because there was a discrepancy in the testimony regarding the time when Mattingly purchased the heroin from Williams and that the explanation of the chemist regarding the two numbers on the Exhibit was unworthy of belief. The $400 sale of heroin by the defendant to Mattingly was around midnight. Mattingly testified it was September 15th or 16th and Olexa testified it was September 16th. Both Mattingly and Olexa testified that the *following morning* Mattingly weighed the white powder in Government's Exhibit 4A, which he had purchased from Williams, sealed Exhibit 4A in another manila envelope and delivered it to the chemist. Both Mattingly and the chemist testified the delivery of the sealed envelope to the chemist was made on September 17th. The chemist also testified that the stamp machine ed when he went to stamp the proper identification num er 56076 on Exhibit 4A, that the machine made the number 56092 instead, that he scratched out the erroneous number 56092 and then stamped the correct number of 56076 thereon.

The District Court committed no error in admitting Government's Exhibit 4A. It was perfectly justified in considering the anachronism minor and not fatal to the admissibility of the exhibit. Likewise no error was committed in accepting the explanation of the scratched out number. The integrity of Government's Exhibit 4A was sufficiently maintained to authorize the District Court to admit it in evidence. We hold that it committed no error in so doing.

The conduct of the Trial Judge, of which Williams so turgidly complains here, was never called into question below. Detailed examination of the record in this case discloses that Williams made no complaint in the District Court "and took no steps to correct any supposedly prejudicial conduct so as to give the Court a chance to correct any mistake it might have made." He attempts to raise these questions here on appeal for the first time. This he cannot do as a matter of right, *United States* v. *Wernecke*, 7 Cir., 1943, 138 F.2d 561, 564, and absent any plain errors

or defects affecting the substantial rights of Williams, and there are none such here, we will not *sua sponte* activate Rule 52(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., as it would be unproductive.

Similarity of this case to the cases of *United States* v. *Scott*, 7 Cir., 1958, 257 F.2d 374 and *United States* v. *Carmel*, 7 Cir., 1959, 267 F.2d 345, cited by Williams is inexistent. The facts are divergent and in *Scott* the defendant properly raised the question below and in *Carmel* the evidence presented a very close case as to the guilt of the defendant. Neither situation here exists. Williams made no objection to any conduct of the Trial Judge below and the evidence in this record overwhelmingly establishes the guilt of the defendant. "We must guard against the magnification on appeal of instances which were of little importance in their setting", *Glasser* v. *United States*, 1942, 315 U.S. 60, 83, and we fail to comprehend how, on this record the alleged errors in conduct of the Trial Judge, of which Williams now complains for the first time, could have possibly influenced the jury to have reached an improper verdict. *Lutwak* v. *United States*, 1953, 344 U.S. 604, 619-620.

Discussion of Williams' contention that the District Court erroneously instructed the jury could serve no purpose other than to unnecessarily extend this opinion as Williams made no objection to any of the instructions given nor to any portion of the charge as required by Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C.A. He cannot, therefore, as a matter of right, raise the question for the first time here on appeal. *United States* v. *Kanton*, 7 Cir., 1959, 264 F.2d 588, 591.

JUDGMENT AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Wednesday, November 18, 1959

Before
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GEORGE WILLIAMS, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12621	

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Monday, November 23, 1959.

Before
Hon. F. Ryan Duffy, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GEORGE WILLIAMS, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12621	

On consideration of the petition of counsel for defendant-appellant,

Is Is Ordered that the issuance of the mandate of this Court be stayed for thirty days in accordance with the provisions of Rule 28 of the Rules of this Court.

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JAMES R. BROWNING, Clerk

No. 899

In the Supreme Court of the United States

OCTOBER TERM, 1959

GEORGE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 599

GEORGE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (App. 106-110) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1959. A petition for rehearing was denied on November 18, 1959 (Pet. App. 6a). The petition for a writ of certiorari was filed on Decem-

[1] The record is in an appendix form and will be referred to as "App."

ber 17, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the conviction for violation of the narcotic laws.

2. Whether the comments of the trial judge during the trial were proper.

STATUTES INVOLVED

21 U.S.C. 174, 70 Stat. 570, provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than 5 or more than 20 years
> * * *
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 U.S.C. 4705 provides:

> (a) It shall be unlawful for any person to sell, barter, exchange, or give away narcotic

drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 7237 provides in pertinent part:

* * * *

(b) Whoever commits an offense, or conspires to commit an offense, described in section 4705 (a) or section 4742 (a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000 * * *.

STATEMENT

A six count indictment returned in the district court for the Northern District of Illinois charged the petitioner with the unlawful sale, transportation and concealment of narcotics, in violation of 26 U.S.C. 4705(a) and 21 U.S.C. 174, *supra*. Before trial, the court granted the government's motion to dismiss count five, and count six was renumbered count five (App. 39-40, 94). Following a trial by jury, petitioner was found guilty as charged, and sentenced to serve a term of imprisonment of seven years (App. 96-98). On appeal, the conviction was affirmed.

1. The pertinent facts may be summarized as follows:

With the assistance of a special employee of the Bureau of Narcotics, Agent Mattingly met the petitioner on September 4, 1958, in Chicago. On in-

quiry by Mattingly, petitioner said that the price was $140 for a "piece" (an ounce), but that, perhaps later, he could come down in his price (App. 8). Later that evening, Mattingly paid the petitioner $140. Petitioner then pointed out a cigarette package under the bumper of a parked station wagon, and said, "There it is" (App. 9, 30; see App. 28). The package contained heroin (App. 71).

Following a telephone call to the petitioner, Mattingly and the petitioner met again in the evening of September 15.[2] When petitioner asked for the money, Mattingly gave him $400 (App. 13-14, 31, 35). At this point, an unidentified man approached and passed to Mattingly an envelope containing a substance which proved to be heroin (App. 14, 72). Petitioner then told Mattingly to take a taxi and leave the area.

On October 16, Mattingly telephoned the petitioner and asked for "two pieces." Petitioner replied that the cost would be $300 because there was "a panic on the streets" (App. 19). Mattingly agreed to the higher price and met the petitioner around 11:30 that evening. Petitioner looked nervous and told Mattingly that there was "a lot of heat" in the area and that he, the petitioner, thought that the "cops" were "around here" (App. 20; see App. 35). A short time later, petitioner asked for the money and told Mattingly that a third party would show him "where the stuff is hidden" (App. 20, 35). At this

[2] When Mattingly told the petitioner during this telephone conversation that he, Mattingly, had "four bills", petitioner replied, "I suppose that you want three pieces" (App. 13).

point, Mattingly gave a prearranged signal, and other agents, who were nearby, assisted him in arresting the petitioner.[3] Shortly thereafter, when the agents asked the petitioner to disclose where the narcotics were hidden, petitioner directed the agents to an alley, and pointing said, "There's where I put it" (App. 20-22; see App. 55-57, 62). When Mattingly picked up a package and asked the petitioner whether that was the package in question, petitioner replied, "Yes, that's it" (App. 22). The package contained heroin (App. 73).

Mattingly testified that, following the September 4 and 15 purchases and the October 16 "seizure", he returned to his office and locked the heroin in his desk for the night, and that on the following mornings the heroin was weighed, and together with the original wrappings or containers was placed in an envelope which was locked, sealed and initialed, and personally delivered by him, with an accompanying agent, to a government chemist in Chicago (App. 9-10, 11, 12, 14-15, 17, 23-27; see App. 47-48, 50, 52, 58). The chemist testified that he received two of the deliveries and that another chemist received the third delivery, and that, following his analysis of the heroin, he placed the heroin (and the other materials received from Mattingly with the respective deliveries) in envelopes which he locked, sealed,

---

[3] Petitioner told the agents that he "make[s] the neighborhood" before he makes his "meet", and that he suspected that Mattingly was an agent when he saw the other agents in the neighborhood (App. 56-57, 63). Petitioner refused to disclose his narcotics-supplier and stated in effect that "if you play you have got to pay" (App. 22).

initialed and stored in a vault (App. 69-70, 71-73, 75-76, 77-80). The chemist also testified that he retained possession of these envelopes until Mattingly called for them at the time of the trial, but that his (the chemist's) possession was not "exclusive" because three other chemists, a secretary, and a helper had access to the vault (App. 72, 76).

2. During the cross-examination of Mattingly, defense counsel inquired into Mattingly's testimony before the grand jury as it pertained to the original count five of the indictment, which had been dismissed on the government's motion at the opening of the trial. When the government objected to this line of questioning, the court indicated its agreement with the government's objection but nevertheless permitted the questioning to continue, stating that it was "not harmful" (App. 39-40). In this connection, Mattingly testified that he was in error before the grand jury if he used the word "sale" in describing his October 15 (*i.e.*, October 16) meeting with the petitioner (App. 40) (The original count five of the indictment charged the petitioner with a "sale" of narcotics on October 15 (16)).

When defense counsel, in his closing argument, told the jury that Mattingly had testified that he lied before the grand jury, the court interjected as follows (App. 92):

> Counsel, the agent did not say that he lied before the Grand Jury. Do not misstate his testimony. He did not say that he lied before the Grand Jury. You may make reasonable inferences, but don't misquote the record.

ARGUMENT

1. Petitioner contends (Pet. 23-25, 27-30) that the evidence is insufficient to support his conviction. To substantiate this, he argues that the government did not adequately corroborate the testimony of Mattingly, who petitioner claims was "impeached" by his own testimony with respect to his statement before the grand jury. Not only is this contention frivolous, but it has no application at all to count five of the indictment, which charged the petitioner with the transportation and concealment on October 15 of narcotics known by him to have been illegally imported. Petitioner admitted that he possessed and hid the heroin in an alley prior to meeting Mattingly on October 16, and he pointed out the location of the heroin (App. 21-22, 55-57, 62, 73). This evidence, standing alone, was sufficient to convict him on count five. Since petitioner received a general seven-year sentence which was less than the maximum permissible on any one of the five counts of which he was convicted, his conviction is properly sustainable on this count alone. *Lawn* v. *United States*, 355 U.S. 339, 359; *Pinkerton* v. *United States*, 328 U.S. 640, fn. 1 at 641-642.

Moreover, the mere fact that Mattingly admitted that he was in error in testifying before the grand jury that petitioner made a "sale" of narcotics to him on October 16 (App. 40-41) does not *ipso facto* render his testimony untrustworthy without corroboration. It is the jury's province to determine the credibility of the witnesses and the weight to be given to their testimony. The other agents fully

corroborated Mattingly with respect to the times, places and dates when Mattingly met the petitioner, to petitioner's admissions and conduct at the time of his arrest, and as to the time and manner in which Mattingly field-tested, secured and handled the heroin obtained from the petitioner (App. 46-49, 50, 51-52, 53-58, 59-63, 66, 67). The evidence amply establishes petitioner's guilt.

Petitioner's claim (Pet. 28-30) that the "chain of possession" of the heroin in the hands of the government was not sufficiently established is likewise erroneous. Merely because the record was unclear as to whether the heroin from the September 4 purchase was locked in a desk or a steel cabinet, or because more than one person had access to the vault in the laboratory where the heroin was stored in a sealed and locked envelope pending trial, or because a machine "slipped" and stamped a wrong number on one of the exhibits (which error was immediately rectified), does not destroy the government's "chain of possession" of the heroin. The jury had ample proof of the great care in securing and safeguarding the heroin, and there was nothing to indicate that anyone tampered with the sealed and locked envelopes. The chemist testified that the "seals cannot be removed without breaking, tearing it or cutting it" (App. 73), and the envelopes containing the heroin were opened in court (App. 10, 16, 26).

2. The comments of the trial judge—left unchallenged at the trial—did not have the effect of taking the issue of Mattingly's credibility from the jury, as petitioner contends (Pet. 25-26). The court allowed

defense counsel to cross-examine Mattingly as to his grand jury testimony on the count which had been dismissed, over the government's objection that this was irrelevant to the issues in the case. The court's comment that this line of questioning was not "harmful" was merely a recognition that the government's position had validity but that there was no harm in ascertaining what had occurred before the grand jury; it did not indicate that the matters adduced on cross-examination of Mattingly were to be disregarded or given little weight. And defense counsel's statement in summation that "Bill Mattingly told you himself that he lied before the Grand Jury" (App. 92) was not supported by Mattingly's testimony that he had been in error before the grand jury in describing the events of October 16 as a "sale" of narcotics. The judge therefore properly admonished counsel not to misstate what Mattingly had said, although pointing out that the defense could draw what reasonable inferences it wished from Mattingly's actual testimony.[4]

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[4] Petitioner also makes a strained argument (Pet. 27-28), based on the judge's casual remark that "It wouldn't make any difference. It still would be heroin" (App. 75), that the judge took from the jury the issue of whether the narcotics had been imported or had been domestically made. The record (App. 74-75) reveals that, on direct examination by the prosecution, the government chemist, in answer to a question whether heroin was a derivative of opium, volunteered the statement that "they have [also] been able to synthesize morphine experimental[ly]"; in answers to further questions by the judge on this subject, the witness added that it was not commercially feasible to make the drug synthetically, and that the particular narcotic in this case

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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was actually a derivative of opium (and therefore not synthesized). The judge then made the remark petitioner now challenges. But the fact is that the witness testified that this narcotic was of the imported variety; that no contrary testimony was offered or suggested; and that petitioner made no objection at the time to the judge's passing remark. In any event, under Section 4705(a), *supra*, p. 2, it is immaterial whether the narcotic is imported or not, and that section is the basis for counts one and three (App. 3-5).

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